

Before the  
**Federal Communications Commission**  
Washington DC 20554

In the Matter of	)	
	)	
i2way Request for Declaratory Ruling	)	WT Docket No. 02-196
Regarding the Ten-Channel Limit	)	
of Section 90.187(e) of the Commission's	)	
Rules	)	
	)	
Hexagram Petition to Deny i2way	)	
Applications	)	
TO: The Commission		

**REPLY OF HEXAGRAM, INC. TO  
OPPOSITION OF I2WAY CORPORATION TO  
APPLICATION FOR REVIEW OF HEXAGRAM, INC.**

May 29, 2003

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**REPLY OF HEXAGRAM, INC. TO  
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APPLICATION FOR REVIEW OF HEXAGRAM, INC.**

Pursuant to Section 1.115(d) of the Commission's Rules, Hexagram, Inc. submits this Reply to the "Opposition to the Application for Review" filed by i2way Corporation on May 16, 2003 (Opposition) against Hexagram's Application for Review of the Order in this proceeding.<sup>1</sup>

Hexagram responds below to each of the points made by i2way. Hexagram disregards i2way's serial name-calling,<sup>2</sup> except to note that it makes a poor substitute for reasoned argument.

**A. Frequency Coordination**

i2way asserts that all of its applications are frequency coordinated in compliance with Section 90.175.<sup>3</sup>

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<sup>1</sup> *i2way Request for Declaratory Ruling*, in WT Docket No. 02-196, Order, DA 03-1044 (Wireless Telecom. Bur. released April 1, 2003) (Order).

<sup>2</sup> i2way characterizes Hexagram's positions as "bizarre" (2), "outrageous" (4), "preposterous" (4), "debas[ing]" (4), and "sophomoric" (4) (page numbers in parentheses).

<sup>3</sup> i2way Opposition at 2.

Hexagram disagrees. Even if a coordinator did process the applications, a coordination in plain violation of the Commission's Rules -- as a trunked system "coordinated" for a number of channels far in excess of the permitted maximum -- is invalid on its face.

In any event, the purpose of frequency coordination is "*to make the review necessary to insure that operations will be interference free.*"<sup>4</sup> Its fundamental goal is to "identify the best available frequency for an applicant, taking into consideration . . . *the best interests of other users as well.*"<sup>5</sup> Purported coordination of many more channels than the rules allow cannot accomplish this purpose. Indeed, it is functionally equivalent to no coordination at all. By accepting applications that cover scores of frequencies, the Bureau effectively waived the coordination requirement as to i2way.

#### **B. Timeliness of Hexagram's Petition to Deny**

Whether Hexagram's Petition to Deny was filed out of time -- or should be accepted out of time -- turns on when (and whether) the Bureau gave valid public notice of the matters Hexagram objected to.

Neither i2way nor the Bureau contends that the two-line public notice of any i2way application gave actual notice of i2way's novel technical proposals and non-interference commitments. Those formed the sole basis for Hexagram's Petition to Deny.

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<sup>4</sup> *Operation of Low Power, Limited Coverage Systems*, 94 F.C.C.2d 32, 36 (1983) (emphasis added).

<sup>5</sup> *See also Frequency Coordination in the Private Land Mobile Radio Services*, 103 F.C.C.2d 1093, 1120 (1986) (emphasis added).

U.S. Court of Appeals and Commission precedent -- not to mention simple fairness -- require the Commission to accept pleadings that, like Hexagram's Petition to Deny, are untimely solely because the pleading party did not have actual notice of the action at issue.<sup>6</sup>

**C. Hexagram's Status as Secondary User**

We respond in Section E below, "Enforcing i2way's Commitments."

**D. Monitoring Co-Channel Usage**

i2way continues to challenge Hexagram's standing by insisting Hexagram is in violation of Section 90.173 for failure to monitor a channel before transmitting.<sup>7</sup> i2way cites neither rule language nor precedent.

When i2way tried to raise this issue against Hexagram's Petition to Deny, the Bureau declined to rule on it, holding the question to be outside the scope of the proceeding.<sup>8</sup> Neither Hexagram nor i2way raised it in an Application for Review. The question thus has no place in the Commission's considerations here.

If the question were addressed, however, Hexagram would have to prevail. Although a *trunked* system like i2way's must monitor a channel before transmitting,<sup>9</sup> neither Section 90.173 nor any other provision or interpretation applies such a requirement to a *conventional* system

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<sup>6</sup> *Gardner v. FCC*, 530 F.2d 1086, 1091-92 (D.C. Cir. 1976); *Roy M. Speer*, 16 FCC Rcd 3993 at para. 11 (1999); *Dorothy D. Park*, 11 FCC Rcd 3450 at para. 1 n.1 (1996).

<sup>7</sup> i2way Opposition at 3.

<sup>8</sup> Order at para. 14.

<sup>9</sup> 47 C.F.R. Sec. 90.187(b).

such as Hexagram's. Nor is Hexagram aware of any commercial products or systems, operating under the rules applicable to Hexagram, that routinely monitor a channel as i2way describes.

**E. Enforcing i2way's Commitments**

i2way does not deny that its applications promised to protect all users from interference, including secondary users such as Hexagram. i2way subsequently disavowed that commitment as to Hexagram,<sup>10</sup> and the Bureau declined to enforce it.<sup>11</sup> Hexagram sought review. Now i2way asserts that the Commission, not Hexagram, determines whether to enforce the commitment.<sup>12</sup>

Hexagram agrees the decision on whether to hold i2way to its commitments rests with the Commission. We just think the Bureau got it wrong. The Bureau declined to enforce i2way's commitments, citing existing rules that require interference protection. The Commission should either hold i2way to its non-interference commitments, or else hold it to the same non-interference rules as everybody else.

The applicable non-interference rules include meaningful coordination on a number of frequencies within the maximum set by the Commission's Rules. If the Commission allows i2way a number of channels far in excess of that maximum, then coordination cannot be effective, for the reasons set out in Part A, above. In that event the Commission must hold i2way to its non-interference commitments.

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<sup>10</sup> Opposition [of i2way] to Petition to Deny at 2-4 (filed April 4, 2003).

<sup>11</sup> Order at para. 14.

<sup>12</sup> See i2way Opposition at 3-4.

#### **F. Hexagram's "Speculation"**

i2way accuses Hexagram of misrepresenting i2way's reasons for its extraordinary offer of co-channel protection (which i2way has since disavowed).<sup>13</sup> Again, i2way raises matters that are not before the Commission and have no bearing on a decision. Hexagram stands by the arguments and citations throughout its Application for Review.

#### **CONCLUSION**

Nothing in i2way's Opposition rebuts the justifications for Hexagram's request for relief: that the Commission *either* (1) require i2way to deliver the protection it offered to all co-channel users, *or* (2) hold i2way to all of the same rules as any ordinary licensee, including (among others) the requirement for frequency coordination and the ten-channel trunking limit.

Respectfully submitted,

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May 29, 2003

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<sup>13</sup> i2way Opposition at 4.

## **CERTIFICATE OF SERVICE**

I, Deborah N. Lunt, an employee of the firm of Fletcher, Heald & Hildreth, PLC, certify that this day of May 29, 2003, I have caused the foregoing "Reply of Hexagram, Inc. to Opposition of i2way Corporation to Application for Review of Hexagram, Inc." to be sent by first class mail, postage prepaid, to the persons named below, except that persons identified as being affiliated with the Federal Communications Commission were instead served by hand delivery and by email.

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